CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 766

C. O. WESTFALL

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED DECEMBER 10, 1926

(32,333)

(32,333)

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INDEX

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[fol. 1]

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 4596

C. O. Westfall, Plaintiff in Error,

vs.

United States of America, Defendant in Error

No. 4597

C. O. Westfall, Plaintiff in Error,

vs.

United States of America, Defendant in Error

Error to the District Court of the United States for the Western District of Michigan, Southern Division

Certified to Supreme Court October 15, 1926

Before Donahue and Moorman, Circuit Judges, and Hickenlooper, District Judge

Statement of Facts

Per Curiam:

The above entitled cases involve the same transaction and were heard and submitted together.

In case No. 4596, the defendant was convicted upon an indictment charging him with unlawfully, wilfully and feloniously aiding, abetting, inciting, counseling and procuring Carl W. Himmler, who was then the branch manager of the Commercial Savings Bank of Grand Rapids, Michigan, a state banking association, which bank was then and there a member of the Federal Reserve System as defined in the Act of Congress of December 23, 1913, to misapply the moneys, property and funds of said bank with intent to injure and defraud said member bank in violation of the pro-

[fol. 2] visions of Section 5209 of the Revised Statutes of the United States.

In cause No. 4597 C. O. Westfall was convicted upon an indictment charging him, Carl W. Himmler and others with conspiracy to commit an offense against the United States, to-wit: the offense of wilfully misapplying the moneys, funds and credits of the Commercial Savings Bank of Grand Rapids, Michigan, a state banking association and a member bank of the Federal Reserve System as defined by the Act of Congress of December 23, 1913, in violation of Section 5209 of the Revised Statutes of the United States and the amendments thereto, on the part of Carl W. Himmler to be committed by him by virtue of his office and while acting as Branch Manager of the Division Avenue Branch of the Commercial Savings Bank of Grand Rapids, Michigan.

The conviction in each of these cases was based upon the same alleged unlawful transactions, to-wit: issuing a fraudulent certificate of deposit for the sum of Ten Thousand Dollars and subsequently paying such certificate from the funds of said bank.

This court has reached a conclusion upon all questions presented by the record in either case other than the question of the constitutionality of Section 9, Chapter 6 of the Federal Reserve Act of December 23, 1913.

No authorities have been cited by counsel precisely in point, but it is urged by counsel on behalf of plaintiff in error that a state bank which becomes a member of a Federal Reserve System does not thereby become an instru-[fol. 3] mentality of the federal government within the doctrines of McCullough v. Maryland, 4 Wheat., 316, 423. By way of analogy counsel for plaintiff in error also cites the Employers' Liability Cases, 207 U. S. 463, 502; Keller v. United States, 213 U. S. 138; Hammer v. Dagenhart, 247 U. S. 251 (First Child labor Case); Child Labor Tax Case, 259 U. S. 20; and Linder v. United States, 268 U. S. 5.

This question is vital and controlling in both of these cases and for this reason, we desire the instruction of the Supreme Court for the proper decision of the following question:

Question Certified

Is the provision of Section 9, Chapter 6, of the Federal Reserve Act of December 23, 1913 as amended June 21, 1917 and July 1, 1922 constitutional in so far as it provides that "such banks and the officers, agents and employes thereof shall also be subject to the provisions of and to the penalties prescribed by Section 5209 of the Revised Statutes?"

Maurice H. Donahue, Circuit Judge. Chas. H. Moorman, Circuit Judge. Smith Hickenlooper, District Judge, sitting by designation in United States Circuit Court of Appeals, Sixth Circuit.

[fol. 4] Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: File No. 32,333. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 766. C. O. Westfall vs. The United States of America. (Certificate.) Filed December 10th, 1926. File No. 32,333.

UNITED STATES OF AMERICA.

THE SUPREME COURT

C. O. WESTFALL,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 766, October Term, 1926.

Question Certified by Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

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INDEX OF CASES.

UNITED STATES OF AMERICA.

THE SUPREME COURT

C. O. WESTFALL,
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vs.
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Defendant in Error.

No. 766, October Term, 1926.

Question Certified by Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The only question involved in this case in this court is the constitutionality of Section 5209, Revised Statutes as amended, as applied to state banks and which are members of Federal Reserve banks. The question is stated by the Circuit Court of Appeals as follows:

"Is the provision of Section 9, Chapter 6, of the Federal Reserve Act of December 23, 1923, as amended June 21, 1917, and July 1, 1922, constitutional in so far as it provides that 'such banks and the officers, agents and employees thereof shall also be subject to the provisions of and to the penalties prescribed by Section 5209 of the Revised Statutes'?"

II.

ARGUMENT.

Section 5209 as amended by the Act of Sept. 26, 1918, reads as follows:

"Section 5209. Any officer, director, agent or employee of any Federal Reserve bank, or of any member bank as defined in the Act of December 23, 1913, known as the Federal Reserve Act, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of such Federal Reserve bank or member bank, or who, without authority from the directors of such Federal Reserve bank or member bank, issues or puts in circulation any of the notes of such Federal Reserve bank or member bank, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of such Federal Reserve bank or member bank, with intent in any case to injure or defraud such Federal Reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal Reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal Reserve bank or member bank, or the Federal Reserve Board; and every receiver of a

national banking association who, with like intent to defraud or injure, embezzles, abstracts, purloins, or willfully misapplies any of the moneys, funds, or assets of his trust, and every person who, with like intent, aids or abets any officer, director, agent, employee or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

"Any Federal Reserve agent, or any agent or employee of such Federal Reserve agent, or of the Federal Reserve board, who embezzles, abstracts or willfully misapplies any moneys, funds or securities intrusted to his care, or without complying with or in violation of the provisions of the Federal Reserve act, issues or puts in circulation any Federal Reserve notes shall be guilty of a misdemeanor and upon conviction in any district court of the United States shall be fined not more than $5,000 or imprisoned for not more than five years, or both in the discretion of the court."

1. We insist that Congress has no power given to it by the constitution to provide a criminal penalty for the committing of an offense against the property rights of a banking association organized under state laws.

The constitution, it will be admitted, contains no express provision authorizing the incorporation of banks by Congress and of course contains no provision authorizing Congress to regulate or interfere with state banking institutions.

Throughout the whole consideration of this case, therefore, we believe that it should be constantly borne in mind that the creation of the Federal Reserve system was accomplished wholly under the implied powers of Congress. Not only has Congress created a Federal Reserve system but it has assumed that it had implied powers

authorizing the attaching of state banking institutions to that system. When this step had been taken it seemed very easy to go a step further and assume that it had implied power to take over the regulation and control of the state banks. It was easy to go still further and to attempt to punish persons who were legally strangers to the state bank but who committed some offense against its property rights. The remoteness of the final step which has been taken from the field of statutory authority defined in the constitution is a very important element to be considered in this case.

The most familiar case dealing with the power of Congress to incorporate banks is that of McCulloch vs. Maryland, 4 Wheaton, 316. In that case, which was decided in 1819, Chief Justice Marshall readily conceded that there was no express power to be found in the constitution for the establishing of a bank or creating a corporation. He explains the history of the constitution, however, particularly with reference to the implied powers which were expressly confirmed to Congress, and finally in support of the assumption of power by which Congress had created the national bank said:

> "Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and purse, all the external relations, and no inconsiderable portion of the industry of the nation are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which

the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed."

The great chief justice then proceeds to inquire what means of execution are available to Congress for carrying out the express powers and dwells at some length upon the necessity for discretion being left with Congress, in the course of which he uses that language which has become almost as well known as the constitution itself: "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are

not prohibited but consist with the letter and spirit of the constitution, are constitutional."

This rule of construction has been made use of by this court without criticism for more than a hundred years, and it is only necessary in any case to decide how the case stands in relation to that rule.

The case of McCulloch vs. Maryland is particularly interesting and valuable in this case for the reason that it involves banking institutions. In the first excerpt which we have quoted from the opinion, the chief justice called to his support every provision of the constitution which would lend strength to the act which Congress had adopted. We must remember that the proposition was a novel one at that time. The national bank had many bitter enemies. It was a subject of political debate. The essential nature of our Federal government and its constitution hinged upon the decision; by its standards political theories were to be tested. We may safely assume, therefore, that the opinion was written for the purpose of convincing its critics as well as disposing of the case then immediately at hand. Therefore if we do not find justification for a congressional enactment such as the one now involved, in the opinion in McCulloch vs. Maryland, we are not apt to find it elsewhere.

Another great test of the powers of Congress reached a crisis in the Legal Tender Cases, 12 Wallace, 457. In that case the Supreme Court divided into two communities of opinion which persisted for many years, and indeed until in the course of nature the personnel of the court had greatly changed; but even by those who adhered to the majority opinion in that case it was not maintained that Congress could exercise powers which in their nature appertained to the states unless those powers

be appropriate and conducive to the proper execution of the express powers found in the constitution.

2. The practice of gathering together within a single statute and even within a single clause powers which may be legitimately exercised and others which, while they may have some apparent relationship, are nevertheless exclusively intrastate, has been clearly condemned by this court in several cases.

The practice consists of proceeding step by step, first in the exercise of proper powers, then in the exercise of others more doubtful but which seem to sustain and extend the first, then likewise to still more doubtful assumptions to sustain the latter until the mandates of the constitution are wholly lost sight of.

A very clear example of this class of legislation is exposed in Employers Liability Cases, 207 U. S. 463. In that case this court declared invalid the first Employers Liability Act, in which in a single paragraph Congress attempted to provide regulations applicable to "every common carrier engaged in a trade or commerce in the District of Columbia or in any territory of the United States, or between the several states, etc.," whether the acts attempted to be regulated were performed in the carrying on of interstate commerce or not.

This court held that it was the duty of Congress and not the court to differentiate between its valid powers and powers which were not bestowed upon it, and that by attempting to throw both classes of legislation into one indivisible statute the act was rendered nugatory.

The danger in legislation of that sort is that it is fundamentally misleading to those whose duty it is to construe it. The Employers Liability Act at first ex-

amination contained much that was valuable and much that was clearly within the powers of Congress but, unfortunately, much was mingled with it that might be deemed generally beneficial, but nevertheless was an intrusion upon the rights of the states. In considering legislation of that character the temptation is ever present to surrender what may seem to be an unimportant state privilege in order to retain the general good which is accomplished by the valid portions of the act.

The case of Keller vs. United States, 213 U. S. 138, is a case of the type which we have mentioned. This case involved the validity of a statute which provided, among other things that any one who gave support or harbor to a female person who had immigrated to the United States within a period of three years and who engaged in immorality or was employed in a house of ill fame should be punished as provided by the statute. This court found that Congress by attempting to enact this regulation had stepped beyond the powers which were granted to it by the constitution. The decision, in effect, was that the attempted regulation was too remote from the general purpose of preventing the importation of women for immoral purposes, and the statute was declared unconstitutional.

3. The Federal government cannot, under pretext of exercising its proper constitutional powers, indirectly and circuitously dictate the internal affairs of the states. This was clearly decided in the case of Hammer vs. Dagenhart. This case held invalid the first child labor statute which provided that goods should not be transported in interstate commerce if made at a factory at which, within thirty days prior to their removal there-

from, children of certain ages had been employed under certain conditions. It was revealed by the opinion of the court that the goods produced were of themselves harmless. This fact was shown by the provision which permitted them to be shipped after thirty days from the time of their removal from the factory. It was also found that the use of interstate transportation was not a part of the evil intended to be restrained and was not necessary to its accomplishment. The court summarized its opinion as follows:

> "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the constitution.
>
> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a two-fold sense is repugnant to the constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

Congress was not to be deterred so easily, however, and as a result adopted the Act of February 24, 1919, 40 Stat. 1057-1138. In this statute a very heavy tax was levied upon the net profits of any institution for the taxable year during any part of which children have been employed or permitted to work under certain conditions. The court, however, held that Congress had again exceeded its authority and had attempted, under the guise of taxation to regulate the intimate details of affairs which were constitutionally reserved to the control of the states. The following remarks of the chief justice are particularly important:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government on the one hand and the national power on the other our country has been able to endure and prosper for nearly a century and a half."

The chief justice also quotes the following from McCulloch vs. Maryland:

> "Should Congress in the execution of its powers adopt measures which are prohibited by the constitution, or should Congress under the pretext of its powers pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

The case of Linder vs. United States, 268 U. S. 5; 45 Sup. Ct. 446, is a very clear illustration of the rule which

limits Congress to the accomplishment of those objects intrusted to it by the constitution, even though it might be deemed convenient and wholesome for the public good for Congress also to administer police powers reserved to the states. The specific instance covered by that case was an alleged offense under the Harrison Anti-Narcotic law. Mr. Justice McReynolds says:

> "Obviously direct control of medical practice in the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to a reasonable enforcement of a revenue measure."

And again he says:

> "The narcotic law is essentially a revenue measure, and its provisions must be reasonably applied with the primary view of enforcing the tax. We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions, or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not be transcended, even though the end seems desirable."

It is submitted that these decisions clearly establish, first, that if it is appropriate and conducive to some constitutional object, Congress may exercise powers which if applied to state matters would have been exclusively within state control; and second, Congress cannot exercise any police powers generally reserved to the states which are not appropriate and conducive to the accomplishment of some constitutional object, even though such a police power may be convenient and closely related to the general subject of legislation and of actual public benefit.

4. It has been repeatedly held by this court that if a statute inseparably embraces legislation which is constitutionally valid with legislation which is invalid, then the whole act must fall together. Congress will not be permitted to stand with one foot on legal ground and with the other trespass upon grounds which are forbidden to it.

One of the leading cases on this subject is United States vs. Reese, 92 U. S. 214. The court had under consideration in that case a statute enacted by Congress ostensibly for the purpose of carrying into execution the provisions of the fifteenth amendment and to prevent discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. Certain sections of the statute, however, which were inseparable in effect from the rest of the statute, provided penalties for offenses which were not within the constitutional authority of Congress, at the same time covering other acts which were within its constitutional powers. The court held that the whole statute must fail, saying:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional,
>
> and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by in-

serting those that are now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is not room for construction, unless it be as to the effect of the constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people."

The foregoing case was cited and followed in the Trade-Mark Cases, 100 U. S. 82, in which the court had before it a statute in which Congress attempted to regulate the use of trade-marks in intrastate business as well as in affairs properly within the control of Congress. The court again held that it could not amend the statute so as to make it applicable only in its valid parts, as the provisions were apparently adopted with one general purpose and such a construction would amount to legislation.

The same rule is again applied in Baldwin vs. Franks, 120 U. S. 678; Spraigue vs. Thompson, 118 U. S. 90; Pollock vs. Farmers Loan & Trust Company, 158 U. S. 608.

5. The statute which is under consideration in the present case exceeds the power granted to Congress by the constitution in attempting to interfere with purely state affairs. The Commercial Savings Bank, whose property rights are alleged to have been invaded in the present case, is a purely state institution. It was organized under a statute which was enacted long before the Federal Reserve act was drafted, although we do not need to say that priority in time is in any wise controlling. We refer to it only to emphasize the point under discussion. It is clear from an examination of the Federal Reserve act that no attempt is made to change the character of state banking corporations. We need not discuss whether or not such an attempt would be constitutional if made.

State banks are invited by the statute to become members of the Federal Reserve banks of the several districts in which they are located. Becoming a member of Federal Reserve banks consists principally in buying a certain amount of capital stock in the Federal Reserve bank. The relationship thereafter existing between the Federal Reserve bank and the member bank is that of corporation and stockholder, and may also from time to time be that of debtor and creditor, the Federal Reserve bank being authorized to purchase negotiable paper from the member bank and also to lend money to the member bank upon such conditions as will insure the safety thereof.

The member bank upon its admission to membership submits itself to examinations to be made of its financial condition by the examiners acting under the Federal government. We insist that there is nothing in these practices which change the character of the bank from that of a state institution to that of an instrumentality

of the national government. The national banks have always been sustained as creatures of Congress upon the assumption that they are instrumentalities of the Federal government.

McCulloch vs. Maryland, 4 Wheat. 316.
Legal Tender Case, 110 U. S. 445.
United Statss Bank vs. Georgia State Bank, 10 Wheat. 333.

There seems to be no reason to doubt that it is as necessary and appropriate for the state to have state banks for the convenience of its citizens, the prosperity of its people and the carrying on of its governmental affairs as it is for the national government to establish national banks for its proper purposes. It has been deemed necessary for the national government to have its own banks under its own domination and control. We submit that it is equally necessary that the state have its state banks under its exclusive control, at least in the carrying on of ordinary state affairs.

The act under discussion (Revised Statutes, Sec. 5209) assumes to punish persons committing certain offenses against a state bank. The best reason which could be argued, in support of such a statute, would be that it was adopted for the purpose of protecting the Federal Reserve banks from possible losses due to the inroads which might be made by fraud upon the resources of state banks, who might at the time be debtors to the Federal Reserve banks. It cannot be argued that such offenses will in any wise menace a Federal Reserve bank on account of the relationship of the member banks as stockholders because under the provision of the Federal Reserve act stock is not issued to the state banks except as paid for.

But if it was the intention of Congress to protect the Federal Reserve banks as creditors from possible impairment of the resources of the member banks as debtors, that object could have been readily accomplished by provisions appropriate to that end. We do not need to question at this time whether the Federal government could punish crimes which constitute a menace to the Federal Reserve bank in its immediate relationship with the member bank. For instance, if a penalty were imposed upon one who abstracted funds which were in the course of transmission from the member bank to the Federal Reserve bank, it would present an entirely different question, but the act in question proposes to punish those who commit offenses against a member bank, which may be or which may not be a debtor of the Federal Reserve bank. It proposes to punish for an offense which may or may not impair the resources of a debtor of the Reserve bank. The statute attempts to legislate upon strictly state affairs in the same section and in the same clause in which it attempts to correct possible evils which may affect Federal bank affairs.

In attempting to seize upon a specific power to be used for a specific purpose Congress sweeps into its control a myriad of instances with which it has no concern.

It would be a very radical assertion to claim that the Federal government may assume control and regulation over all persons and institutions who may be debtors to national banks. This would extend the national power to matters which are intrinsically local in their nature. If it were carried to its logical culmination, state authority would become but a shadow. Every industry and every commercial institution which borrowed money from a national bank would then receive its instructions from Washington and would look to Congress for its

existence, regulation and protection. It is hard to imagine anything that would be left for the states to regulate. If the creditor and debtor relationship can be made the foundation for extending the powers of the national government then we have taken the most important and revolutionary step that has yet been attempted. This is not a conjectural possibility but is the very foundation of the government's contention in the present case.

The language of the statute is so broad that it applies to offenses committed against state banks even in those instances in which the offense can not possibly result in any loss or inconvenience to the Federal Reserve bank. This being an inseparable feature of the act, we submit that the act must fail unless all of the offenses covered by it can be shown to be within the authority of Congress to punish.

6. It may be contended in support of the statute that the Federal Reserve act was designed to create a national system of banks which would include all state banks which might elect to attach themselves to it. This contention can not be sustained, because Congress can not by providing broad and comprehensive regulations for the control of a subject within its constitutional authority invade the fields of legislation which are reserved to the states.

This is well illustrated by the distinction which has been persistently made by this court between interstate commerce and intrastate commerce. The first great decision under the commerce clause was Gibbons vs. Ogden, 9 Wheat. 1. In that case Chief Justice Marshall wholly sustained the power of Congress to regulate interstate commerce in its entirety by whatever system it might de-

vise, but he carefully distinguished interstate commerce from that which was wholly within the states, and expressly conceded that the commerce which was wholly intrastate was wholly within the authority of the state.

The Employers Liability Cases, supra, expressly recognizes and enforces this distinction that, although Congress may set up a system of regulations affecting interstate commerce it must keep its hands entirely off intrastate trade.

In the case of Railway vs. Interstate Commerce Commission, 162 U. S. 184, the same limitation of the power of Congress is again recognized.

It might also be said that the Federal government has set up a system of controlling the sale of narcotics and could therefore follow the ramifications of the business throughout its whole area, but as we have already seen in the case of Linder vs. United States, supra, this court compelled the Federal government to stop as it was about to overstep its constitutional limits.

It therefore seems clear that Congress cannot by setting up one institution or a class of institutions for national purposes gather unto itself the power to control other institutions which are just as clearly creatures of the state government and exercising intrastate functions. The end does not justify the means when the means are expressly or impliedly forbidden.

7. Again it may be argued that the state bank by voluntarily accepting the provisions of the Federal Reserve act has placed itself within the authority and control of Congress.

This argument is fallacious in any case involving violations of constitutional restrictions, but it is particu-

larly unsound as applied to this statute. The statute does not aim merely to punish the state bank and its officers but attempts to penalize those who are legally strangers to the state bank. This case is an instance of it. The respondent, Westfall, a stranger to the Commercial Savings Bank, was indicted for aiding and abetting an officer of the bank and for conspiring with an officer of the bank. It can not possibly be maintained that persons wholly unassociated with the bank can be deprived of their constitutional guaranties by any acquiescence of the bank in the provisions of an unconstitutional statute.

But, as we have said, the contention that a citizen or corporation can be deprived of its constitutional guaranties by being induced to consent thereto is unsupportable in any case.

The constitution has divided the sovereign powers ordinarily exercised by governments for the benefit and protection of their citizens, and has placed a part of these powers exclusively within the control of Congress. How oppressive it would be, therefore, if the Federal government were permitted to say to its citizens: "We have in our custody certain beneficial powers which you may enjoy only on condition that you surrender to us other powers which you have heretofore expressly withheld."

The fallacious contention which we have mentioned was unanswerably refuted by Mr. Justice White in the Employers Liability Cases, supra, at page 502 in the following language:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because

one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the constitution endures."

To the same effect see Schowllenberger vs. Pennsylvania, 171 U. S. 1, and Collins vs. New Hampshire, 171 U. S. 30.

In these cases this court held that Congress had no power to forbid the transportation of legitimate and harmless products in interstate commerce for a lawful and proper purpose by requiring oleomargerine to be colored in such a manner as would render it unmarketable when sold in competition with other products intended for the same purpose.

We submit that the rule laid down by Mr. Justice White, above, applies with great force to the statute now under consideration. If Congress can exact from state banking institutions a surrender to Federal authority of this particular police power as a condition for the

conferring by Congress of great benefits which the citizens of the state have a natural right to enjoy, then there is no discernible limit at which we may expect the national government to stop. It may similarly acquire the right to govern the most ordinary of commercial transactions, the negotiation of paper, the acceptance of deposits, the form of secured loans and the manner of signing checks. It could demand from the state the right to control the hours of opening and closing the banks, the hours of labor therein and the issuing and sale of stock. State banks would cease to exist except in name, except in those rare instances of banks who did not desire to avail themselves of the great benefits naturally enjoyed under the Federal Reserve system. The price of refusal to surrender would be isolation and stagnation.

The same things may be said of practically every form of commercial and industrial organiaztion and activity. Congress undoubtedly has power to regulate the conduct of warehouses in their relations to interstate commerce. If it can interfere in the intrastate affairs of local warehouses as a condition to permitting such warehouses to receive the benefits of interstate commerce then the national government can gather unto itself absolute domination of the agricultural and commercial life of the people.

8. If we once concede that the national government has control of this field of legislation, even though that field be held concurrently with the states, we must also be ready to admit that Congress may exclude the states from control or regulation within this field. We believe that we are justified in assuming that if the statute under

consideration is upheld this court will eventually be compelled to rule that the Federal statute is supreme to the extent that it renders a state statute for the punishment of a similar crime invalid. In order that it may not appear that our fears are unfounded let us refer to the Michigan statute which has heretofore been available to the courts of Michigan for the punishment of the same crimes described in the Federal statute now before us. We refer to Sec. 8027 Compiled Laws of Michigan of 1915, being Sec. 58 of Act 205 of Public Acts of 1887. The section referred to reads as follows:

> "Section 58. Every president, director, cashier, treasurer, teller, clerk or agent of any bank, who embezzles, abstracts or willfully misapplies any of the moneys, funds, credits or property of the bank, whether owned by it or held in trust, or who, without authority of the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of the bank, with intent in either case to injure or defraud the bank, or any company, corporation or person or to deceive any officer of the bank or any agent appointed to examine the affairs of such bank, and any person who with like intent aids or abets any officer, clerk, or agent, in violation of this section, or who shall issue or cause to be issued, or put in circulation, any bill, note or other evidence of debt to circulate as money, upon conviction thereof, shall be imprisoned in the state prison or in the state house of correction and reformatory at Ionia, not to exceed twenty years."

The State of Michigan has seen fit to punish an offense of this kind against its banks by imprisonment not to exceed twenty years as compared with a penalty imposed by the Federal statute of not more than five years.

Numerous convictions have been had under the Michigan statute, some of which have reached the court of last resort of the state. It needs no argument to show how greatly state power and authority will be impaired if Federal authority is permitted to possess this field of control.

In this discussion we have in mind the language found in Collins vs. New Hampshire, 171 U. S. 34.

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatsoever language a statute may be found, its purpose must be determined by its natural and reasonable effect."

This principle has been recognized by this court in other cases.

> Henderson vs. Mayor of New York, 92, U. S. 259.
> Morgan Steamship Company vs. Louisiana, 118 U. S. 462.

The state cannot divest itself of police power, because that is necessary to its very existence. One is a part of the other and neither can exist without the other. It seems to have been thought advisable by the framers of Sec. 5209 to take the powers usually exercised by the states and place them in Federal hands, perhaps distrusting the ability of the states to enforce their own laws. This method is as unsound in theory as it is in law. The dignity and authority of the state cannot be built up by weakening its necessary functions. The body of the state's power cannot be strengthened by denying it the privilege of exercise. To continue this course

would be to make sovereign states merely dependent tributaries. The present commanding position of the Union has been attained by the erection of a powerful federation composed of individually powerful states, each voluntarily yielding to the other supremacy in certain fields, and each jealously holding for itself the dominion over others. State governments and state institutions cannot under our present form of government be forced into the status of mere mouth-pieces of the will of Congress in state affairs.

We believe that we have established that there is no power to be implied from the constitution by which Congress can impose a penalty for an offense against a state bank as has been attempted in this instance. It will not be claimed that there is any express power giving the statute validity. We believe that the authority attempted to be exercised is wholly remote from the fields of control delegated to the national government. We insist that it is neither a necessary nor appropriate means of exercising any proper national function under the constitution.

We therefore submit that the answer of this court to the inquiry of the Circuit Court of Appeals *whether or not Section* 5209 *is constitutional as applied to state banks* should be "No".

Respectfully submitted,

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